



Commonwealth of Massachusetts State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851



CONFLICT OF INTEREST OPINION EC-COI-02-03

QUESTION

The City Clerks' Association asks whether the conflict of interest law will prohibit municipal clerks who are also justices of the peace under G. L. c. 207, § 38 from accepting the statutory fee of \$75, provided by G. L. c. 262, § 35, as amended by St. 2002, c. 164, for solemnizing marriages during their municipal work day on municipal premises.

ANSWER

No, because the General Laws authorize municipal clerks who have also been appointed justices of the peace to collect the statutory fee and solemnize marriages during municipal time on municipal premises.

FACTS

To become a justice of the peace, one makes application to the governor.¹ General Law Chapter 207, § 38 states, "A marriage may be solemnized in any place in the commonwealth by . . . a justice of the peace if he is also a clerk or assistant clerk of a city or town." For over a century, municipal clerks who have also been appointed justices of the peace have been expressly authorized to solemnize marriages.² In addition, the governor also has the authority to designate a justice of the peace, who is not otherwise a municipal clerk, in each town to solemnize marriages.³

Justices of the peace have long been authorized under the General Laws to collect fees for solemnizing marriages.⁴ For almost two centuries prior to 1975: "The fee for lawfully solemnizing and certifying a marriage [was] one dollar and twenty-five cents."⁵

Pursuant to St. 1975, c. 464, § 3, the following language replaced the above-quoted language in G. L. c. 262, § 35: "The fee for lawfully solemnizing and certifying a marriage shall not exceed twenty-five dollars if performed in the justice of the peace's home community or thirty-five dollars if performed in a contiguous community; provided, however that no additional charge shall be made for travel in connection with such solemnizing notwithstanding any law to the contrary."

Apart from changes in the amount of fees and the description of geographic location within the Commonwealth where the fees apply,⁶ the next major change in § 35 was implemented by St. 1989, c. 711, "An Act Relative to Justices of the Peace," which *added* the following:

Nor shall any additional charge be made by a justice of the peace, for providing flowers, for providing music, for providing a photographer, for providing a location where the marriage ceremony takes place, or for providing an unofficial certificate of marriage. Additional charges are allowable for prenuptial counseling conferences, rehearsals, and other other [sic]⁷ special requests by the couples [sic]⁸ whose marriage is being solemnized; provided, however, that the amount of these additional charges must be disclosed in writing to the couple whose marriage is being solemnized at least forty-eight hours prior to the rendering of these services. The total fee for lawfully solemnizing and

certifying a marriage shall not exceed the fee limit fixed for solemnizing and certifying a marriage in a justice of the peace's home community where a municipal employee who is also a justice of the peace solemnizes a marriage in a municipal building at a time when said building is regularly open for business.

Most recently, G. L. c. 262, § 35 was amended to increase the fees for a marriage performed in the justice of the peace's home community from \$45 to \$75, and from \$60 to \$125 for a marriage performed outside his home community.⁹

Throughout the Commonwealth, municipal clerks who have also been appointed justices of the peace solemnize marriages during their normal workday, on municipal premises. Based on their understanding of G. L. c. 262, § 35, and an Ethics Commission Fact Sheet discussed below, they personally collect the statutory fees for marriages they solemnize.

On May 24, 1989, the staff of the Ethics Commission issued a Commission Fact Sheet, entitled, "Town & City Clerks – Justices of the Peace" (Fact Sheet).¹⁰ The entire text of the Fact Sheet was distributed in "The Public Recorder," a publication of the Massachusetts Town Clerks' Association in 1989.¹¹ The Fact Sheet discussed only the application of G. L. c. 268A, § 23(b)(2) to town and city clerks who are also justices of the peace. As discussed further below, the Fact Sheet concluded that the simultaneous receipt of a municipal salary and a solemnization fee for a marriage conducted in the municipal clerks' home community does not violate § 23(b)(2) because the statutory fee, at that time, was \$35, which is not "of substantial value." The Fact Sheet stated, "JP/Clerks may personally accept marriage solemnization fees for ceremonies performed at municipal facilities during normal working hours."

Because the most recent change in the statutory fee for a marriage in a clerk's home community has increased the amount to \$75,¹² the City Clerks' Association now asks whether § 23(b)(2) will prohibit municipal clerks from receiving the fee.

DISCUSSION

The question of a municipal clerk's¹³ receipt of the statutory fees for solemnizing marriages raises issues under G. L. c. 268A, § 23. Under this section, a municipal clerk may not "use or attempt to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals."¹⁴ As we said in *EC-COI-92-23*, we have "interpreted this provision as prohibiting public employees from obtaining a special advantage of substantial value, not authorized by law *or by their official duties*, by virtue of their public positions."¹⁵

There is no question that a municipal clerk/justice of the peace uses his municipal clerk position when he solemnizes a marriage during his normal work schedule on municipal premises. While he is being paid to perform his municipal duties during the normal work schedule, he is also being paid, from a private source, the statutory fee to solemnize a marriage.

However, in considering potential issues involving § 23, the advice in the Fact Sheet turned on the conclusion that the statutory fee of \$35.00 per marriage was not "of substantial value." We need to reexamine that advice because it predated not only St. 1989, c. 711 but also the Commission's subsequent interpretations of § 23(b)(2). In *EC-COI-92-23*, we concluded, with respect to municipal clerks' arranging to make telephone calls of election results to the News Election Service in return for the

Service's making payments to the Town Clerks' Association, that because there was no legal authority for the clerks to use "their unique immediate access to election results to secure . . . financial benefits for their private Association," § 23(b)(2) prohibited them from so doing. We commented, however, that "payments explicitly authorized by regulation would . . . comply with § 23(b)(2), because they would not be 'unwarranted.'" Similarly, in *EC-COI-92-38*, we noted that a solicitation by a state agency did not violate § 23(b)(2) because it was authorized by statute, and thus a reasonable extension of the state employees' official duties.¹⁶

As always, our analysis begins with the plain meaning of the relevant law or laws.¹⁷ First, G. L. c. 207, § 38 specifies that "a justice of the peace **if** he is also a clerk or assistant clerk"¹⁸ has the authority to solemnize a marriage. This evidences a legislative acknowledgement that the same individual is in a position to solemnize a marriage, provided he is a justice of the peace. And, as noted at the outset, municipal clerks who are also justices of the peace have long had the authority to solemnize marriages for a fee.

Next, the plain meaning of G. L. c. 262, § 35, and its antecedent statutes, allow justices of the peace to keep the specific fees authorized therein for solemnizing marriages. As is clear from entire text of § 35, a justice of the peace is entitled to the fees for solemnizing a marriage but not entitled to additional charges for travel, for providing flowers, music, a photographer, a location, or providing an *unofficial* marriage certificate. He may, however, accept additional charges for "rendering . . . services" including "prenuptial counseling conferences, rehearsals, and other special requests by the couple" provided that he discloses these additional charges in writing to the couple at least forty-eight hours prior to providing the services.

Although municipal clerks/justices of the peace have long solemnized marriages during municipal time and on municipal premises, the language in the controlling statutes did not explicitly refer to such a use of municipal time or municipal resources until the enactment of St. 1989, c. 711, § 5. Under this Act, the Legislature further acknowledged not only the long-standing authority that justices of the peace are entitled to certain fees but also the fact that municipal clerks who are justices of the peace commonly solemnize marriages during their municipal work day, on municipal premises. This is reflected in the last phrase of the section, which sets the fee limit "for solemnizing and certifying a marriage in a justice of the peace's home community where a municipal employee who is also a justice of the peace solemnizes a marriage *in a municipal building at a time when said building is regularly open for business.*"¹⁹ In this same context, the Legislature also provided restrictions on additional charges available to the justices of the peace.

In interpreting the meaning of this statutory change, we may consider the purpose of the legislation,²⁰ in that "the purpose and not the letter of the statute controls,"²¹ and the "fair import" of the statute.²² We also consider that the enactment of this language occurred after the enactment of G. L. c. 268A. Courts ordinarily construe statutes to be consistent with one another, assuming that the Legislature was aware of existing statutes when enacting subsequent ones.²³ "Thus, we attempt to interpret statutes addressing the same subject matter harmoniously."²⁴ However, when two statutes cover the same subject matter, the more recent statute prevails and, if there is a conflict between the new and prior statutes, the new provision will control.²⁵

Given the long standing and widespread practice of municipal clerks/justices of the peace receiving private funds to solemnize marriages, and the express acknowledgment that such was occurring "in a municipal building" during regular business hours, the Legislature must have appreciated the potential for a conflict of interest. The Legislature was aware of the potential for abuse of a justice of the peace's authority because it also added restrictions on imposing certain additional charges. Although G.

L. c. 262, § 35 could have been written more explicitly regarding the use of municipal time and resources, we have not concluded that statutes must include express reference to G. L. c. 268A in order to modify the application of the conflict law.²⁶

CONCLUSION

Accordingly, we conclude that the statutory authorization under G. L. c. 207, § 38 and c. 262, § 35 makes the receipt of the solemnization fee for a marriage performed on municipal premises during the municipal clerk's normal business hours **not** an "unwarranted privilege of substantial value." It follows that the statutory *amount* of that privilege makes no difference because the Legislature also authorized it. We conclude, therefore, that the municipal clerks' receipt of the increased statutory fee of \$75, though "of substantial value" for purposes of the conflict of interest law, will not violate § 23(b)(2).²⁷

In contrast, while we believe that G. L. c. 207, § 38 and c. 262, § 35 accommodate couples by allowing them to be married at a town or city clerk's office by the same official who issues their marriage certificates, we do not interpret these statutes to extend such an accommodation outside the clerks' offices in a way that conflicts with their municipal duties. In addition, notwithstanding the legal authority we have identified that supports the receipt of solemnization fees during municipal time, such a privilege could become unwarranted under § 23(b)(2) if a clerk/justice of the peace were to use municipal time and resources to solemnize marriages such that it adversely affected the municipal clerk's ability to fulfill his official duties and responsibilities.

Finally, we note that § 23(e) expressly allows municipalities to impose additional restrictions on the conduct of their municipal employees and officials.²⁸ Given that municipal clerks may be appointed or elected, serve full or part time, receive salaries from their municipalities or receive statutory fees,²⁹ it is reasonable for municipalities to control the allocation of municipal clerks' time during the normal work schedule to ensure that their solemnization of marriages, in their capacities as justices of the peace, does not interfere with the performance of their duties as municipal clerks.

DATE AUTHORIZED: September 5, 2002.

¹Const. Pt. 2, c. 2, § 1, Art. 9; Op. Atty. Gen., January 7, 1965, pp. 173-174; Op. Atty. Gen., September 14, 1927. *See also* G. L. c. 222, § 1: "Justices of the peace and notaries public shall be appointed, and their commissions shall be issued, for the commonwealth, and they shall have jurisdiction throughout the commonwealth when acting under the sole authority of such a commission."

The Governor's "Guidelines for Appointment As Justice of the Peace" state: "The Governor will appoint city, town, and court clerks and their assistants as justices of the peace. This appointment is necessary to empower these individuals to perform marriages. However, no special designation to marry is needed by these individuals, since one who holds any on of the above offices and is also a justice of the peace may solemnize marriages. (MGL Ch. 207, s. 38)"

² *See* St. 1899, c. 387, § 1: "No justice of the peace shall solemnize a marriage in this Commonwealth unless he also holds one of the following offices: City or town clerk or assistant city or town clerk; city registrar or assistant city registrar; clerk of a court or assistant clerk of a court; or unless he shall have been specially designated by the governor as hereinafter provided. Section 2. The governor may, at his discretion, designate justices of the peace who may solemnize marriages in the city or town in which they severally reside." *See also* G. L. c. 207, § 39: "The governor may in his discretion designate a justice of the peace in each town and such further number; not exceeding one for every five thousand inhabitants of a city or town, as he considers expedient, to solemnize marriages, and

may for cause at any time revoke such designation. The state secretary, upon payment of twenty-five dollars to him by a justice of the peace so designated, who is also a clerk or assistant clerk of a city or town or upon the payment of fifty dollars by any other such justice, shall issue to him a certificate of such designation”

³G. L. c. 207, § 39.

⁴ See e.g., St. 1795, c. 41: “To every Minister or Justice of the Peace who shall lawfully solemnize a marriage & certify the same, One Dollar & twenty five Cents.” G.S. 1860, c. 157, § 10: “For lawfully solemnizing and certifying a marriage by a minister or justice of the peace, one dollar and twenty-five cents.” R.L. 1902, c. 204, § 26: “The fee for lawfully solemnizing and certifying a marriage shall be one dollar and twenty-five cents.”

⁵ See e.g., G. L. c. 262, § 35 (prior to St. 1975, c. 464, § 3).

⁶ See St. 1981, c. 521, § 2; St. 1983, c. 159.

⁷ The second word “other” does not appear in the Official Edition of the General Laws.

⁸ St. 1992, c. 286, § 263 changed the word “couples” to “couple.”

⁹ St. 2002, c. 164, approved July 12, 2002.

¹⁰ On May 14, 1998, the Fact Sheet was withdrawn from the Commission’s list of publications because it was considered outdated. We also note that the Commission’s staff has received, until this request, few inquiries about the guidance in the Fact Sheet.

¹¹ Although the date on the Fact Sheet is May, the Public Recorder date is March 1989.

¹² The new fees will become effective as of October 10, 2002.

¹³ “Municipal employee, a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis” G. L. c. 268A, § 1(g).

¹⁴ G. L. c. 268A, § 23(b)(2).

¹⁵ Emphasis added.

¹⁶ EC-COI-92-38, n. 2.

¹⁷ *Int’l Organization of Masters, etc. v. Woods Hole, Martha’s Vineyard & Nantucket Steamship Authority*, 392 Mass. 811, 813 (1984) (“The intent of the legislature is to be determined primarily from the words of the statute, given their natural import in common and approved usage, and with reference to the conditions existing at the time of enactment. This intent is discerned from the ordinary meaning of the words in a statute considered in the context of the objectives which the law seeks to fulfill.”)

¹⁸ Emphasis added.

¹⁹ Emphasis added.

²⁰ Nothing in the legislative records concerning the house bill, House No. 2882, 1989, which underlies St. 1989, c. 711, and the materials provided to the Senate and Governor further illuminates the purpose.

²¹ *Walsh v. Ogorzalek*, 372 Mass. 271, 274 (1977).

²² *Thatcher v. Secretary of Commonwealth*, 250 Mass. 181, 191 (1924).

²³ *Green v. Wyman-Gordon, Co.*, 422 Mass. 551, 554 (1996).

²⁴ *Id.* See also *Eastern Racing Association v. Assessors of Revere*, 300 Mass. 578, 581 (1938).

²⁵ *Sutherland Statutory Construction*, § 51: 02, pp. 193-194 (6th Ed.).

²⁶ See *EC-COI-92-4* (the Commission advised, for example, that a regulation which would authorize private compensation under § 4(a) might state that “community colleges . . . as necessary to carry out and discharge their official duties, may appoint volunteer . . . personnel . . . provided, however, that such volunteer personnel may receive compensation from their private employer . . .”). Compare *Edgartown v. State Ethics Commission*, 391 Mass. 83, 87-88, n. 5 (1984) (discusses what might meet the “provided by law” requirement of § 17(a)).

In addition, we acknowledge that for at least 13 years, the Clerks’ Association and its members have relied on advice in the Fact Sheet that effectively said the use of municipal time and resources to solemnize marriages did not raise any issues under the conflict law except whether the fee received was of substantial value for purposes of § 23(b)(2).

²⁷ Section 3, in general, prohibits a public official from receiving anything of substantial value “for or because of any official act or act within his official responsibility” unless “provided by law for the proper discharge of official duty.” Section 17 prohibits a municipal official from receiving compensation from anyone other than his municipality “in relation to any particular matter in which the [municipality] is a party or has a direct and substantial interest” unless “provided by law for the proper discharge of official duties.” The receipt of private funds by a municipal clerk raises issues under both §§ 3 and 17. However, here, we conclude that the receipt of fees does not implicate § 3 for municipal clerks and that the receipt of the fees by municipal clerks is authorized by law or regulation for purposes of § 17. The Legislature has set statutory fees and specifically has set statutory fees for municipal clerks who are also justices of the peace. G. L. c. 262, § 35; G. L. c. 207, § 38.

²⁸ See e.g., *EC-COI-96-1*.

²⁹ According to the Clerks’ Association, the compensation arrangements for municipal clerks vary depending upon the size of the municipality and whether it is a city or town form of government. Under G. L. c. 262, § 34, which enumerates a wide variety of fees municipal clerks may charge for providing copies or recording various types of certificates, in some municipalities the clerks are entitled to the fees, while in others, the fees go to municipal accounts. For example, until St. 2002, c. 157, the following appeared in G. L. c. 41, § 19: “In towns under one thousand inhabitants no person appointed as assistant clerk shall receive any salary for services as such from the town, but his compensation, if any, for such services shall be paid by the clerk, to whom all fees received by the assistant shall be paid.”